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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR *AMICI CURIAE* STATES OF OKLAHOMA, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MAINE, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW MEXICO, RHODE ISLAND, SOUTH DAKOTA, TEXAS, WEST VIRGINIA, WISCONSIN AND WYOMING, AND THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF THE STATE OF NORTH CAROLINA'S PETITION FOR A WRIT OF CERTIORARI

W.A. DREW EDMONDSON
Counsel of Record
Attorney General of Oklahoma
KELLY HUNTER BURCH
Assistant Attorney General
State Capitol, Room 112
2300 North Lincoln Blvd.
Oklahoma City, OK 73105
(405) 521-3921

January 21, 1998

(Additional counsel listed on inside cover)

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Robert A. Butterworth
Attorney General of Florida
The Capitol, PL 01
Tallahassee, FL 32399
(904) 487-1963

Margery S. Bronster
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

Alan G. Lance
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720
(208) 334-2400

Jeffrey A. Modisett
Attorney General of Indiana
402 W. Washington Street
Fifth Floor
Indianapolis, IN 46204
(317) 233-4386

Thomas J. Miller
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5164

Carla J. Stovall
Attorney General of Kansas
Judicial Bldg., 301 S.W. Tenth Ave.
Topeka, KS 66612
(913) 296-2215

Andrew Ketterer
Attorney General of Maine
6 State House Station
Augusta, ME 04333
(207) 626-8800

J. Joseph Curran, Jr.
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

Hubert H. Humphrey III
Attorney General of Minnesota
State Capitol, Suite 102
St. Paul, MN 55155
(612) 296-6196

Jeremiah W. Nixon
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

Joseph P. Mazurek
Attorney General of Montana
Justice Building, P.O. Box 201401
Helena, MT 59620
(406) 444-2026

Frankie Sue Del Papa
Attorney General of Nevada
100 N. Carson Street
Carson City, NV 89701
(702) 687-4170

Tom Udall
Attorney General of New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 827-6000

Mike Fisher
Attorney General of Pennsylvania
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

Jeffrey B. Pine
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

Mark Barnett
Attorney General of South Dakota
500 East Capitol
Pierre, SD 57501
(605) 773-3215

Dan Morales
Attorney General of Texas
Capitol Station, P.O. Box 12548
Austin, TX 78711
(512) 463-2191

Darrell V. McGraw, Jr.
Attorney General of West Virginia
State Capitol, Room E-26
Charleston, WV 25305
(304) 558-2021

James E. Doyle
Attorney General of Wisconsin
State Capitol, Suite 114 East
Post Office Box 7857
Madison, WI 53707
(608) 266-1221

William U. Hill
Attorney General of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

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INTEREST OF *AMICI CURIAE*

The States are the primary stewards of the waters within their borders. *See* 33 U.S.C. § 1251(b) (Pet. App. 137a). They are responsible for ensuring that water of sufficient quality is available for a variety of essential uses, such as human consumption, plant and wildlife habitat, irrigation, industrial and economic development, and recreation. Each

State has developed a complex scheme of statutory and regulatory water quality standards and devotes substantial resources to implement its water policy.

Section 401 of the Clean Water Act ("CWA") is the principal and most effective tool the States possess to implement their water quality standards during federal license proceedings, including Federal Energy Regulatory Commission ("FERC") hydroelectric license proceedings. *See* 33 U.S.C. § 1341 ("Section 401") (Pet. App. 185a-189a). To protect water quality, Section 401 authorizes the States to veto federally licensed projects or to impose on those projects conditions more stringent than federal law requires. *See, e.g., American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997); *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

The decision of the Court of Appeals wrongfully arrogates to the federal government the States' authority to assure compliance with State water quality laws. It permits FERC to approve amendments to licenses which will add pollution to water without State consent; and it offends fundamental principles of federalism within a critical subset of federal license proceedings.

SUMMARY OF ARGUMENT

The Court of Appeals' misconstruction of Section 401 will impact virtually every State. Its decision renders States powerless to impose necessary water quality conditions on FERC-licensed activities that could dramatically alter the flow, dissolved oxygen content, temperature, and other characteristics of a river, simply because those activities do not "add" a "substance" to the water. The decision further ignores and conflicts with *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) ("*PUD No. 1*").

ARGUMENT

A. THE COURT OF APPEALS' MISCONSTRUCTION OF SECTION 401 WILL HAVE PROFOUND ADVERSE IMPACTS ON STATE POWER AND RESPONSIBILITY TO PROTECT WATER QUALITY

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (Pet. App. 136a). At its outset, the CWA provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C. § 1251(b) (Pet. App. 137a).

In order to achieve these objectives, Congress enacted Section 401, which authorizes a State to review federally licensed projects that "originate[]" or "will originate" a "discharge" within that State. 33 U.S.C. § 1341(a)(1) (Pet. App. 185a). If a State determines that a project will not comply with its water quality laws, it may either veto the project or impose conditions relating to water quality which the federal agency *must* incorporate in the license. *See* 33 U.S.C. § 1341(d) (Pet. App. 189a); *Keating*, 927 F.2d at 622. A State is free to impose more stringent conditions than federal law requires. *Keating*, 927 F.2d at 622.

Through Section 401, the States routinely prescribe conditions for FERC-licensed dams, such as minimum flow requirements, to ensure that downstream waters are not harmed by man-made alterations to the hydrologic system. *E.g.*, *PUD No. 1*, 511 U.S. at 700; *American Rivers*, 129 F.3d at 102-05.

Dams such as those licensed by FERC can dramatically impact water quality downstream from a project:

> The river emerging from a dam is not the same river that entered its reservoir. That new river may be hotter or colder. Its daily discharge may

> vary wildly, while its seasonal pattern of high spring floods and low winter flow may be inhibited beyond recognition. Suddenly starved of its sediment load, the clear waters of a river below a dam may scour its bed and banks. An entirely new succession of riparian plants and animals may move into the river and valley below a dam. Native fishes may die or be severely stressed.

Michael Collier, *et al.*, U.S. Geological Survey, Circular 1126, *Dams and Rivers: A Primer on the Downstream Effects of Dams* at 7 (1996); *see id.* at 1 ("regulated rivers are fundamentally different ecological and physical entities from untamed rivers"). Regardless of how stringently a State controls other sources of pollution in a given river system, poor management of a dam may profoundly degrade water quality. It is imperative that the States retain sufficient regulatory authority over dams to preserve overall water quality.

The Court of Appeals decision wrongfully prevents the States from reviewing, conditioning, and/or certifying any federally licensed changes to the operation of and discharge of water from more than one thousand hydroelectric dams in the United States unless the changes involve the "addition" of a "substance" to the navigable waters. *See* Pet. App. 17a-20a. The consequences of this shift in power from the States to the federal government will be severe and irreversible. A FERC license may, and often does, last for fifty years. *See* 16 U.S.C. §§ 799 & 808(e). During that time, the licensee may, and often does, seek to amend its license. *See, e.g., Bellows-Tower Hydro, Inc.*, 79 FERC ¶ 62,183 (1997) (eliminating minimum flows because aesthetics no longer priority at project site); *Alabama Power Co.*, 79 FERC ¶ 62,182 (1997) (modifying flow releases to accommodate recreational interests).

As a result of a license amendment, the discharge from a dam can be altered substantially, and the downstream water polluted, without the "addition" of a "substance" to the water. For example, a licensee could install new pumps at an existing water intake facility in a FERC-licensed reservoir to significantly increase the pumping rates at that facility -- indeed, to pump the lake dry. Or a licensee could change from run of river operation, in which the discharge from the project approximates the inflow, to peaking operation, in which the discharge is determined by power needs, which fluctuate greatly from hour to hour. In either case, the change could decimate fish and wildlife, destroy recreation, and impact industry adversely. Yet neither change would add a substance to the water; and, therefore, under the Court of Appeals decision, the host State would have no Section 401 certification rights to address the threat to water quality.

B. THE COURT OF APPEALS DECISION IS INCONSISTENT WITH THIS COURT'S RULING IN *PUD NO. 1 OF JEFFERSON COUNTY V. WASHINGTON DEPARTMENT OF ECOLOGY*

In *PUD No. 1,* this Court made the following fundamental observation regarding the scope of the CWA and of State authority under Section 401:

> Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or . . . as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute

> water pollution. . . . [The CWA] expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams."

PUD No. 1, 511 U.S. at 719-20 (citation omitted). Thus, the CWA and Section 401 embody a "broad conception of pollution," *id.* at 719, including, as here, a reduction in water quantity flowing over a dam as a result of the issuance by FERC of a license amendment.

The Court of Appeals disregarded this Court's ruling in *PUD No. 1*. In holding that an alteration of an existing discharge is not "any discharge" within the meaning of Section 401, the Court of Appeals put beyond the reach of the States exactly the types of changes to water quality that this Court held were within the scope of the CWA. In short, the decision of the Court of Appeals eviscerates *PUD No. 1*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of the State of North Carolina should be granted.

Respectfully submitted,

W.A. Drew Edmondson
Counsel of Record
Attorney General of Oklahoma
Kelly Hunter Burch
Assistant Attorney General
State Capitol, Room 112
2300 North Lincoln Blvd.
Oklahoma City, OK 73105
(405) 521-3921

Dated: January 21, 1998

Robert A. Butterworth
Attorney General of Florida
The Capitol, PL 01
Tallahassee, FL 32399
(904) 487-1963

Carla J. Stovall
Attorney General of Kansas
Judicial Building
301 S.W. Tenth Avenue
Topeka, KS 66612
(913) 296-2215

Margery S. Bronster
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

Andrew Ketterer
Attorney General of Maine
6 State House Station
Augusta, ME 04333
(207) 626-8800

Alan G. Lance
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720
(208) 334-2400

J. Joseph Curran, Jr.
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

Jeffrey A. Modisett
Attorney General of Indiana
402 W. Washington Street
Fifth Floor
Indianapolis, IN 46204
(317) 233-4386

Hubert H. Humphrey III
Attorney General of Minnesota
State Capitol, Suite 102
St. Paul, MN 55155
(612) 296-6196

Thomas J. Miller
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5164

Jeremiah W. Nixon
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

Joseph P. Mazurek
Attorney General of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620
(406) 444-2026

Mark Barnett
Attorney General of South Dakota
500 East Capitol
Pierre, SD 57501
(605) 773-3215

Frankie Sue Del Papa
Attorney General of Nevada
100 N. Carson Street
Carson City, NV 89701
(702) 687-4170

Dan Morales
Attorney General of Texas
Capitol Station
P.O. Box 12548
Austin, TX 78711
(512) 463-2191

Tom Udall
Attorney General of New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 827-6000

Darrell V. McGraw, Jr.
Attorney General of West Virginia
State Capitol, Room E-26
Charleston, WV 25305
(304) 558-2021

Mike Fisher
Attorney General of Pennsylvania
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

James E. Doyle
Attorney General of Wisconsin
State Capitol, Suite 114 East
Post Office Box 7857
Madison, WI 53707
(608) 266-1221

Jeffrey B. Pine
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

William U. Hill
Attorney General of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841